

COMMITTEE REPORT

TO: Robert E. Carter, Jr.

FROM: Sandra Jensen

RE: Citizens' Petitions to Amend Marina Ratemaking Nonrule Policy Document, Administrative Cause 09-054P

DATE: October 5, 2009

On March 13, 2009, the Natural Resources Commission (*Commission*) received two citizens petitions seeking the amendment of a Nonrule Policy Document, Information Bulletin #20 (*IB20*) relating to the "Ratemaking Process for Resorts and Marinas under Lease with the Department of Natural Resources." These petitions were submitted by Jeff Dukes (*Dukes*), who operates Hoosier Hills Marina on Patoka Lake, and by Kent Reineking (*Reineking*), who operates Kent's Harbor on Brookville Lake. On March 19, 2009, Martin Dixon, President, Patoka Lake Marina, Inc., joined in Dukes' petition.

The existing IB20 requires marina operators who are seeking to increase any fee to file a petition with the Division of State Parks and Reservoirs by April 1st of the year preceding the year in which the increased rates, if approved, will be implemented. As is particularly relevant to the requested amendments to IB20, the process presently requires a marina operator to notify all of its existing slip and buoy renters by First Class U.S. mail of any request for rate increase, including rate increases associated with lodging. The process also requires a public hearing to be held in June or July in all cases and further requires the hearing officer to submit all requests for rate increase to the Commission for final recommendation to the US Army Corps of Engineers.

Dukes' petition specifically seeks to change the deadline for filing a request for rate increase from April 1st to January 1st and offers amendments that would allow the Department to approve rate increases if the Department concluded that the proposed increase in rates was reasonable and comparable to other similar marina rates. Under Dukes' proposal the Department's approval of rates would occur without the need to notify any customer and without the need for Commission review or oversight.

Dukes' proposal contemplates occasions where the Department might conclude that the marina's proposed rates were not reasonable or comparable with other similar marinas. In this latter instance, Dukes' proposal requires the Department to notify the marina that a public hearing is required. On that occurrence the marina operator would be obligated to notify only "affected" customers. Dukes proceeds to propose that if less than 10% of the notified customers object to the requested increase in rates then the marina would be allowed to increase the rates without further proceedings. Only if 10% or more of the notified customers object to the proposed rates, would a hearing officer be obligated to

seek Commission review and consideration of a rate recommendation to the US Army Corps of Engineers.

Reineking's petition for amendment to IB20 seeks to repeal the January 2009 amendment that changed the application of IB20 from rates for "slips, guestrooms and houseboats" to rates for "any fee" charged by the marina.

On March 18, 2009, in accordance with Nonrule Policy, Information Bulletin #7, which controls the process of handling citizen's petitions for amendment to nonrule policy documents, the Department of Natural Resources (*Department*) Director, Robert E. Carter, Jr., along with John Davis and Ron McAhron, Department Deputy Directors, Dan Bortner, the Director of the Division of State Parks and Reservoirs and Gary Miller, Assistant Director of Inns and Concessions for the Department's Division of State Parks and Reservoirs, were notified of Dukes' and Reineking's petitions. At that time the Department was invited to establish a committee to conduct a review of the merits of the petitions. On March 27, 2009, John Davis appointed a committee consisting of Sandra Jensen, Gary Miller, Bob Felix, and Jim Roach, with Jensen to serve as the chair.

After two committee meetings it was the consensus of the committee that certain amendments to IB20 appeared to be reasonable. Most of the committee's recommended amendments are directly related to the amendments sought through the citizens' petitions; however, the committee, in conducting its review, identified additional amendments that it believes will add clarity to the ratemaking review process.

After developing a draft of amendments proposed for IB20, the committee invited the operators of all marinas operated under long term leases with the Department for a roundtable discussion of the proposed amendments. The meeting occurred on September 1, 2009. Input received from the marina operators in attendance resulted in a few additional amendments.

The amendments proposed by the committee are as follows:

- 1. The committee recommends that the term "any fee" be removed and IB20 be made applicable to "accommodations or lodging; slips or other mooring facilities, including buoys and docking stations; and houseboats, including floating cabins..."**

In January 2009, IB20 was amended to apply to "any fee." This amendment was intended to clarify that IB20 was applicable not only to slips but also to all mooring facilities such as buoys and easy ports and was also applicable to lodging and accommodations in the form of floating cabins.

Marina operators expressed their concern that the term "any fee" could be interpreted to require Commission approval of prices charged for such things as repair services, prices charged for merchandise in a ship store or prices for gasoline, which was not

the intent of the January 2009 amendment. The committee's recommendation will make the necessary correction to clarify the applicability of IB20.

2. The committee recommends that a definition of "comparable marina" be established.

The language of the lease agreements between the Department and the marinas requires a review of proposed rates as compared to rates charged by comparable marinas. The practice of both the Department and the Commission has been to compare the rates of a marina seeking a rate establishment or increase to other marinas that offer similar amenities and maintain comparable facilities.

Increasingly marina operators seeking rate increases or establishments have submitted and the Department has sought out and considered the rates of marinas located at great distances from Indiana in order to find marinas that have slips of the size for which the rate increase or establishment is requested. This has led to the consideration of rates charged by marinas located in geographical areas, such as California, that have very different cost of living indexes than the Midwest.

It has been and will continue to be difficult to identify comparable marinas but the leases require the practice of considering the similarity of amenities offered and facilities maintained to continue to be the cornerstone of the consideration. However, it is the consensus of the committee that a marina seeking a rate increase should be compared with other marinas located within 400 miles of the marina's location. This addition ensures that the rates being used for comparison purposes are located in the Midwest, which will typically mean that they both exist in the same cost of living environment. Also, the marina operators and the Department are likely going to be more familiar with the facilities and amenities offered by marinas that are located closer. Furthermore, the patrons of Indiana's marinas are not as likely to travel over 400 miles to visit a distant marina so the comparison will consider rates that are likely to be experienced first hand by Indiana's marina patrons. Finally, the establishment of this definition provides the marina operators with a degree of certainty as to what the Department will be considering with respect to their request for rate increase or establishment.

3. The committee recommends that the time for submission of requests for rate increase or establishment be moved from April 1st to January 1st and that all following deadlines for fulfilling processing requirements be adjusted accordingly.

The committee recognizes that the majority of marina's bill customers in September for the following boating season. For this reason the existing time schedule provided in IB20, which provides for Commission consideration of rate requests in September, is not optimal for the marina operators. Furthermore, the processing of requests for rate increase under IB20's present schedule is difficult for the Division of State Parks and Reservoirs, as it occurs between April and September, which is the Division's

busiest time of the year. By moving the request deadline to January the interests of both the marinas and the Department are served.

4. **The committee recommends that the marina operators be allowed to provide notice of rate increases or establishment relating to slips, to marina patrons by electronic mail**

The marina operators are presently required to provide notice to all marina patrons by U.S. First Class Mail when they seek to increase or establish rates. For marinas with 100 slip holders, the expense of sending this notice is significant and for marinas, like Fourwinds, which has over 800 slip holders, the expense is tremendous.

Dukes' petition for change to IB20 seeks to address this situation by nearly eliminating the public notice requirement in many instances and to only require notice to "affected customers" in other situations. The committee chair confirmed that what Dukes considers to be an "affected customer" is a renter of a size of slip the rate for which is included in the rate increase or establishment request. For instance if a 20' slip rate was being increased but a 22' slip rate was not being increased, under Dukes' proposal only the holder of the 20' slip would be served with notice.

The committee concluded that a marina customer who rents a slip of a size that will not be impacted by a rate increase or establishment may not be directly affected; however, that slip holder may have an indirect interest in the rate being charged for a different sized slip. It is understood that a long-term renter of a 24' slip is not likely going to be interested in the rates being established for an 80' houseboat slip, but there are the more likely situations in which a slip renter might be interested in the rates of other sizes of slips. For instance a renter at a particular marina is more likely to remain at that marina and while that renter may presently only require a 20' slip, he/she may be interested in purchasing a larger boat that would require an increased size slip the following year. For this reason it is obvious that renters throughout a marina need to be advised of rate setting processes.

One means of addressing the costs associated with providing the required notice is to allow the marinas to make these notifications by electronic mail. This amendment is in line with other Commission activities that are authorized to be conducted electronically.

5. **The committee recommends that requests for rate increase or establishment for "accommodations or lodging... and houseboats, including floating cabins" be allowed to post the notice at their business office.**

The operators of Fourwinds Marina, Kent's Harbor, Hoosier Hills Marina and Patoka Lake Marina, who maintain accommodations in the form of resort hotels, floating cabins or landward cabins, each stated that less than 10% of the business from accommodation rental involved or was associated with the patrons of the marina.

Therefore, providing notice to the marina patrons failed to provide sensible notice of a request for rate increase or establishment associated with accommodations.

It was suggested and the committee agrees that marina operators should not be required to provide notice of requests for rate increase or establishment to the renters of slips, provided that the request relates solely to accommodations. Instead the marina should be required to post the required notice in a conspicuous location within the business office.

This change will not effect the required content of the notice or the ability of the public to provide input about the request.

6. The committee recommends that a three tiered process be established for reviewing requests for rate establishment or increase.

Presently IB20 requires all requests for rate increase or establishment to be processed in the same way, with each of them requiring a public hearing as well as consideration by the Commission before a final recommendation is made to the US Army Corps of Engineers.

In the past three years, there have been nine requests for rate increase considered by the Commission. For eight of those petitions there was very little or no participation by the public at the public hearing and the public input that was received in writing, either by electronic or regular mail, was also minimal. The ninth petition involved a marina with patrons who, being unhappy with the management of the marina, took advantage of the opportunity to express their opposition to the proposed rate increases both in writing and through the public hearing. It is apparent that when members of the public are interested they will participate in the opportunities provided to them and these opportunities should continue to be provided. However, in many cases the requests for rate increase are not controversial and obligating the marina operator, Department staff and a Commission hearing officer to appear for a public hearing at which no member of public participates appears to be an inefficient use of time and resources.

The committee has concluded that the Department and the Commission must maintain a regulatory oversight over the activities of marina operators acting under lease agreements on Department owned and leased properties. The committee is also committed to providing the public an opportunity to participate in processes established to provide for that oversight. However, it is the committee's belief that the Department's and Commission's oversight associated with rates charged by the marinas operating under long-term leases can be provided in a more efficient manner.

For the above stated reasons the committee recommends that IB20 be amended to eliminate the need for a public hearing unless 10% of the notified patrons, in the case of a slip rate increase, or 25 people, in the case of accommodation rate increase, request a public hearing be held. In the event the Commission hearing officer does

not receive the requisite number of requests for public hearing, any requests that are received will be considered by the Commission's hearing officer as public comments.

The amendments continue to provide for a tiered approach to considering requests for rate increase or establishment as follows:

Tier 1

If a requested rate increase is two percent (2%) or less and no public hearing is required, the Commission's hearing officer, in consultation with the Department, will act as the delegate of the Commission in considering and approving, disapproving or approving in part the marina's rate request and offering the Commission's recommendation to the US Army Corps of Engineers. Under this tier the hearing officer's determination will be based upon a full consideration of the comparables provided and the fair market rates charged by comparable facilities. This tier would be a totally new concept for IB20.

Tier 2

If the requested rate increase is over two percent (2%) and no public hearing is required, the hearing officer acting in consultation with the Department will prepare a written report for presentation to the Commission for the Commission to consider in approving, disapproving or approving in part the marina's request. Following a determination by the Commission, the hearing officer would prepare and submit the Commission's recommendation to the US Army Corps of Engineers. This tier is the same as existing processes except that no public hearing would be conducted.

Tier 3

Regardless of the percent of increase requested by the marina operator, if a sufficient number of requests for public hearing are received, the marina operator will be obligated to notify all marina slip renters that the hearing officer will conduct a public hearing. Following the public hearing, the hearing officer will prepare a written report for presentation to the Commission for consideration and approval, disapproval or approval in part. The Commission's determination will be memorialized by the hearing officer and submitted as the Commission's recommendation to the US Army Corps of Engineers. This tier is the same as presently occurs for all requests for rate increase.

The committee believes that in instances where there is not a sufficient number of requests for a public hearing there is likely no real controversy associated with the rate increase being requested. Where there is no apparent controversy and the amount of the increase is minimal (less than 2%) it appears reasonable to eliminate the need for full Commission review.

However, it is the committee's opinion that the Commission should have an opportunity to fully consider any request for rate increase that exceeds two percent (2%), whether or not there existed sufficient public interest to require the conduct of a public hearing. The committee also observes that regardless of the requested amount of increase if public interest was sufficient to require the hearing officer to conduct a public hearing, there is also the need for full Commission involvement in the decision-making process.

7. The committee recommends that a marina operator seeking permanence of an interim rate be subjected to a public hearing only upon receipt of the requisite number of requests from marina patrons

The committee believes that the rationale stated in paragraph 6, above, relating to conducting public hearings is also applicable to the consideration of requests to permanently establish previously set interim rates. The amendments will require the hearing officer to conduct a public hearing only upon receipt of the necessary number of public requests. However, any request to make an interim rate permanent must be submitted to the Commission for consideration.

The committee has provided a copy of IB20, as proposed for amendment, as Exhibit A to this report.

EXHIBIT A

Information Bulletin #20 (Third Amendment)

SUBJECT: Ratemaking Process for Resorts and Marinas under Lease with the Department of Natural Resources

1. Purpose

The purpose of this information bulletin is to implement an informal process for the administrative review of ratemaking recommendations for resorts and marinas under lease with the Department of Natural Resources (Department). The process was established by the Natural Resources Commission (Commission) during a meeting held March 24, 1998 and made applicable to rate increases to become effective in 1999 and in subsequent years. The process was published in the Indiana Register on May 1, 1998 (21 IR 3209) as Information Bulletin #20. The Commission amended the information bulletin on May 20, 2003, effective July 1, 2003, and published at 26 IR 3761. ~~On~~ **The information bulletin was amended by the Commission a second time on January 13, 2009, the Commission approved a second amendment to this bulletin and posted to the Indiana Register database website as 20090121-IR-312090045NRA. The Commission amended the information bulletin a third time on (insert date).** The timeframes established by this information bulletin are essential to its effective implementation.

2. Rate Establishment and Increase Requests

(A) A lessee shall not impose ~~any~~ a fee upon a member of the public **for accommodations or lodging; slips or other mooring facilities, including buoys and docking stations; and houseboats, including floating cabins** without first having obtained approval from the Commission ~~and the U.S. Army Corps of Engineers~~. A lessee shall submit its request for rate establishment and increase to the Department's Division of State Parks and Reservoirs **and the Division of Hearings of the Commission (Hearings Division)** in accordance with the existing lease agreement for the following year by ~~April 1~~ **January 1** of the preceding year. The lessee shall include justification for the request **and the total number of existing renters** along with ~~comparable~~ rates from other **comparable** marinas.

(B) For purposes of this information bulletin a "comparable marina" is a marina located within 400 miles of the lessee's marina that maintains facilities and provides amenities similar to the marina for which a rate establishment or increase request has been submitted.

3. Processing Rate Establishment and Increase Requests and Comments

(A) ~~Within fourteen (14) days of receiving a request, the Department shall inform the Division of Hearings of the Commission (Hearings Division). The Hearings Division will assign a cause number and in consultation with the Department, select the date, time and location in Marion County for a rate hearing to be held. Not later than May 1, the~~

~~Department shall advise the lessee of the date, time, and location of the rate hearing. This hearing will be held in early June or July of each year~~ **hearing officer.**

By February 1 the Department shall notify the lessee of the assigned administrative cause number, identity of the hearing officer and hearing officer's electronic mail address.

(B) ~~By May 30~~ **March 1**, the lessee shall provide written notice, by personal delivery ~~or~~ U.S. first class mail **or by electronic mail**, to each slip renter or buoy renter that the lessee is requesting a rate establishment or increase **associated with slips or other mooring facilities, including buoys and docking stations.** ~~The notice shall include the time, date, and location of the rate hearing as well as the proposed new rates.~~ The notice shall **include the proposed rates and** advise the renter **that a rate hearing will be scheduled only upon submission of requests for rate hearing by ten percent (10%) of the renters within fifteen (15) days of the opportunity to provide comments.** to the hearing officer, ~~either~~ by **personal delivery**, U.S. first class mail sent to the Division of Hearings, Natural Resources Commission, Indiana Government Center North, Room N501, 100 North Senate Avenue, Indianapolis, Indiana 46204-2200 or by electronic mail. The lessee shall also provide the renter with the hearing officer's electronic mail address. ~~Before the public hearing~~ **Not later than March 15**, the lessee must provide the Hearings Division with a copy of the notice and a listing that includes the names and addresses of persons notified under this paragraph. The lessee shall, by **sworn** affidavit or affirmation, authenticate **the date of mailing and** that all addressees were served as indicated in the listing. If the lessee asserts the listing contains trade secrets, the Uniform Trade Secrets Act (IC 24-2-3) applies.

(C) By March 1, the lessee shall post written notice in a conspicuous location at the lessee's business office of a request for rate establishment or increase associated with accommodations, lodging and houseboats, including floating cabins. The notice shall include the proposed rates and advise the public that a rate hearing will be scheduled only upon submission of twenty-five (25) individual requests for rate hearing to the hearing officer at the Division of Hearings, Natural Resources Commission, Indiana Government Center North, Room N501, 100 North Senate Avenue, Indianapolis, Indiana 46204-2200 or by electronic mail within fifteen (15) days. The lessee shall also provide the public with the hearing officer's electronic mail address.

~~(C)~~ **(D)** Petitions, requests, documentation, exhibits, and other pertinent materials concerning ~~the~~ **any** rate establishment or increase request shall be made available for the public to review at the lessee's business office, during normal business hours, from ~~May 30~~ **March 1** until the date of the rate hearing **or a determination is made with respect to the request, whichever is earlier.** A copy will be available for review at the Division of State Parks and Reservoirs, 402 West Washington Street, Room W298, Indianapolis, IN 46204. The listing of persons notified required in paragraph (B) is not governed by this paragraph.

~~(D) Any person may send written comments concerning the rate establishment or increase request to the Division of Hearings, Natural Resources Commission, Indiana Government Center North, Room N501, 100 North Senate Avenue, Indianapolis, IN~~

~~46204-2200. Email comments may also be submitted to the hearing officer at the electronic mail address provided in the notice issued in accordance with paragraph (B).~~

(E) In accordance with the existing lease agreements, the Department will analyze comparable ~~facilities~~ **marinas** to compare rates with those sought by the lessee. Results of that analysis will be presented ~~at to the rate hearing conducted by the hearing officer~~ **not later than March 15**. Information used in this analysis will also be available for inspection at the Division of State Parks and Reservoirs office in Indianapolis.

(F) If a sufficient number of requests for rate hearing are received, the hearing officer shall schedule a rate hearing under Section 4 of this Information Bulletin. If a sufficient number of requests for rate hearing are not received no rate hearing will be conducted, but any requests for rate hearing received will be considered as public comments.

(G) For requests for rate increase seeking increases of two percent (2%) or less for which no public hearing is required, the hearing officer, in consultation with the Department, will act as the delegate of the Commission in determining the lessee's request. Serving as the Commission's delegate, the hearing officer shall consider the Department's analysis of comparable marinas to compare rates with those sought by the lessee. A hearing officer may recommend approval of the rate increase, disapproval of the rate increase, or approval of a rate increase in an amount less than requested by the lessee. A hearing officer's recommendation for rate increase shall not be withheld unless the rates proposed exceed the fair market rates charged by operators of other similar privately-owned resort developments comparable to the project in the area.

(H) For requests for rate increase seeking increases of over two percent (2%) for which no public hearing is required, the hearing officer, in consultation with the Department, will prepare a written report to the Commission, which includes written findings and a proposal to the Commission for recommendations to the U.S. Army Corps of Engineers.

4. Public Hearing and Presentation to Commission

If a sufficient number of requests for rate hearing are received, the hearing officer, in consultation with the Department, will select the date, time and location in Marion County for a rate hearing to be held. The rate hearing will be held in May or June. Not later than April 1, the Department shall advise the lessee of the date, time, and location of the rate hearing. By April 30, the lessee shall provide written notice, by personal delivery, U.S. first class mail or by electronic mail, to each slip renter or buoy renter of the time, date, and location of the rate hearing. The notice shall also advise the renter of the opportunity to provide comments to the hearing officer, either by U.S. first class mail sent to the Division of Hearings, Natural Resources Commission, Indiana Government Center North, Room N501, 100 North Senate Avenue, Indianapolis, Indiana 46204-2200 or by electronic mail. Not later than the date of the public hearing the lessee shall provide the Hearings Division with a copy of the notice and a sworn affidavit or affirmation, authenticate the date of mailing and that all addresses were served as indicated in the initial notice listing. If the lessee asserts the listing contains trade secrets, the Uniform Trade Secrets Act (IC 24-2-3) applies.

Any person may attend the rate hearing and provide oral or written statements **or send written comments concerning the rate establishment or increase request.** The hearing officer shall conduct the hearing in an orderly and informal manner designed to develop a fair and complete agency record. The administrative orders and procedures act (IC 4-21.5) does not apply, but the Commission delegates authority to the hearing officer under IC 14-11-1-3 to make any reasonable orders to implement this information bulletin.

The lessee's request and any supporting documentation, written comments, the analysis by the Department, and oral and written statements received during the rate hearing form the record upon which the hearing officer shall review the request for rate establishment or increase. Following the completion of the review, the hearing officer shall make a written report to the Commission. The report shall include written findings with respect to the requested rate establishment or increase and a proposal to the Commission for recommendations to the U.S. Army Corps of Engineers. ~~The hearing officer shall also forward a copy of the report to the lessee, the Department, and any other person who requests a copy.~~

5. Presentation to the Commission

Except for requests for rate establishment or increase addressed under paragraph 3G, The hearing officer shall present the findings and recommendations to the Commission during a meeting to be held in ~~August or September~~ **May or July**. During that meeting, the Commission shall either recommend approval of the rate establishment or increase, disapproval of the rate establishment or increase, or approval of a rate establishment or increase in an amount less than requested by the lessee.

Recommendation for favorable consideration of a rate establishment or increase shall not be withheld unless, in the opinion of the Commission, the rates proposed exceed the fair market rates charged by operators of other similar privately-owned resort developments comparable to the project in the area.

5. 6. Recommendation by Commission and Final Action by Army Corps

For requests for rate establishment or increase that are required to be presented to the Commission under Section 5, the Commission's secretary shall memorialize the Commission recommendations in writing. Within seven (7) days after the Commission meeting, the Department shall forward the recommendation to the District Engineer of the U.S. Army Corps of Engineers for final action.

6. 7. Setting Interim Rates

The Commission delegates authority to the ~~director of the~~ Division of State Parks and Reservoirs to set interim rates for any fee based item **identified in Section 2(A)** that become available after ~~April~~ **January 1** due to new construction, modification of existing facilities or lessee initiatives, such that a rate cannot be established through this process for the year in which the item first becomes available. The lessee may charge the interim rates for only one season.

The lessee shall submit a request for rate establishment in accordance with ~~paragraph~~ **Section 2** before ~~April~~ **January 1** following the establishment of the interim

rate. The hearing officer will process the lessee's request for rate establishment as set forth in paragraphs **3(A – F), 4 and, as applicable, paragraphs 5 and 6.**

7. Access to Reports and Index of Commission Findings and Recommendations

Upon completion, the hearing officer shall forward a copy of the report of findings and proposal for Commission recommendation to the U.S. Corps of Engineers to the lessee, the Department, and any other person who requests a copy.

The Hearings Division is directed to index, and place on the Commission's website, findings and recommendations made under this information bulletin after August 1, 2003. To promote equity and consistency, the department and the Commission may consider these indexed findings and recommendations as precedents.

8. History

Information Bulletin #20 (First Amendment), published at 26 IR 3761, superseded Information Bulletin #20 published at 26 IR 3439. The Commission's findings and recommendations made under this information bulletin after August 1, 2003 are indexed and posted to the Commission's homepage at <http://www.in.gov/nrc/2389.htm>.